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Attorneys for **SARA NEWSOME BURNS**

**UNITED STATES BANKRUPTCY COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

In re:

CASE NO. <sup>99</sup>~~98~~-00811-B13

**SARA NEWSOME BURNS**, an individual,

**DEBTOR'S OPPOSITION TO EX  
 PARTE APPLICATION FOR ORDER TO  
 PAY TRUSTEE**

Debtor.

[No Hearing Set]

SARA NEWSOME BURNS, an individual and the debtor in these proceedings ("Debtor") respectfully submits the following opposition to the "Ex Parte Application for Order to Pay Trustee" (the "Application") brought by creditor BRADLEY PROULX ("Proulx"). In opposition to the Application, Debtor represents as follows:

**I.**

**INTRODUCTION**

Not only is the instant Application procedurally defective, it also seeks relief which is inappropriate and unavailable under the Bankruptcy Code. The Debtor agrees with Proulx that the final payment due from the United State of America (the "USA") is property of the estate. However, because these are Chapter 13

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**ORIGINAL**

1 proceedings, 11 U.S.C. §1306(b) expressly provides, indeed  
2 requires, that the Debtor is to remain in possession of all  
3 property of her estate. There is simply no authority, and Proulx  
4 has cited none, to support the relief requested in the  
5 Application. The relief requested is improper and the Application  
6 must be denied.

7 The application is procedurally defective for at least three  
8 reasons. First, as stated in the moving papers, the Application  
9 is essentially an action for turnover under 11 U.S.C. §542. As is  
10 discussed below, under the Federal Rules of Bankruptcy Procedure  
11 ("FRBP") such relief must be pursued in the form of an adversary  
12 proceeding, not a simple ex parte application. Second, there is  
13 no urgency to this matter, and therefore no reason that this  
14 dispute should not be heard under the normal notice requirements  
15 of FRBP 9014 and Bankruptcy Local Rule ("BLR") 9014-4. Finally,  
16 Proulx does not have standing to move for an order requiring the  
17 turnover of estate property from a third party, the USA, to the  
18 Chapter 13 Trustee.

19 Despite these fatal defects to the Application and the  
20 requested relief, the Debtor has a proposal that should address  
21 Proulx's concerns. As stated in the Application, the payment from  
22 the USA arises from a "whistle blower" action in which the Debtor  
23 was awarded \$580,000.00. Proulx contends that he provided  
24 detective services in connection with the Debtor's prosecution of  
25 her claim, and is therefore entitled to one-third of the judgment  
26 pursuant to a contingent fee agreement. The Debtor contends that  
27 Proulx did not provide the services required under their  
28 agreement, and therefore is not entitled to any of the proceeds.

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1 Although Proulx prevailed in California Superior Court action  
2 on his contingent claim, that judgment has been appealed and is  
3 currently under review. In addition to issues regarding the  
4 merits of Proulx's claims, the Debtor has raised jurisdictional  
5 issues in the appeal. Based on the analysis of the attorney  
6 handling the appeal, the Debtor believes that there is a  
7 substantial likelihood that the judgment will be overturned, and  
8 the Proulx claim will disappear. The Debtor also believes that if  
9 the money is turned over to Proulx, and then the Debtor prevails  
10 on the appeal, that Proulx will have spent the money and will not  
11 be able to return it, to the detriment of the Debtor and her  
12 legitimate creditors.

13 For these reasons, the Debtor is willing to have all payments  
14 from the USA deposited in the client trust account of her Chapter  
15 13 attorneys, Robbins & Keehn. Said sums could only be  
16 distributed pursuant to the terms of a Chapter 13 plan approved by  
17 this Court, by this Court's order, or with the written consent of  
18 Proulx. This solution protects both the Debtor and Proulx from  
19 using this money until the appeal is resolved or this Court has  
20 approved a Chapter 13 plan. It also is a solution which fits  
21 within the narrow confines of 11 U.S.C. §1306(b) by permitting the  
22 Debtor to remain in possession of her estate property.

23 As a final note, Proulx argues that the Debtor attempted to  
24 hide this asset in her original petition. As is disclosed in the  
25 Declaration of G. M. Rojas-Wiederaenders filed concurrently  
26 herewith, this was the result of a software problem associated  
27 with "Bankruptcy 2000", to computer program used by this Court for  
28 electronic filing. It is simply untrue that the Debtor was

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1 attempting to hide this asset.

2 II.

3 ARGUMENT

4 A. The Relief Requested Is Not Permitted Under 11 U.S.C. 1306.

5 The Application seeks this Court's order directing the USA to  
6 make all remaining payments due under the judgment against them to  
7 the Trustee herein. There is no dispute that said moneys are  
8 property of the Debtor's bankruptcy estate. It is important to  
9 keep this fact in mind when reading 11 U.S.C. §1306(b), which  
10 provides as follows:

11 Except as provided in a confirmed plan or order  
12 confirming a plan, the debtor shall remain in possession  
13 of all property of the estate. (Emphasis added.)

14 The language of 1306(b) is unambiguous. Only upon the entry  
15 of an order confirming a plan can a Chapter 13 debtor be  
16 dispossessed of his or her property. There has been no such order  
17 entered in these proceedings. Accordingly, the Debtor is entitled  
18 to retain control of all estate assets, including any future  
19 payments from the USA. See, In re Stewart, 3 B.R. 24 (1980  
20 Bnkrtcy. ND Ohio); In re Estrada, 224 B.R. 132, 136 (1998 Bnkrtcy.  
21 SD Cal). The relief sought in the Application is inappropriate,  
22 and therefore the Application must be denied.

23 B. The Application Is Procedurally Defective.

24 As stated above, the Application is procedurally defective  
25 for three reasons.

26 1. The relief requested requires the initiation of an  
27 Adversary proceeding.

28 In support of the Application Proulx cites 11 U.S.C. §542  
which governs turnover of property of a bankruptcy estate.

1 However, this is not an action by a trustee to compel the Debtor  
 2 to turn over estate property. Therefore, the requirements of FRBP  
 3 7001 apply. Rule 7001 provides as follows:

4 An adversary proceeding is governed by the rules of this  
 5 Part VII. It is a proceeding (1) to recover money or  
 6 property, except a proceeding to compel the debtor to  
 7 deliver property to the trustee, or a proceeding under §  
 8 554(b) or § 725 of the Code, Rule 2017, or Rule 6002,  
 9 (2) to determine the validity, priority, or extent of a  
 10 lien or other interest in property, other than a  
 11 proceeding under Rule 4003(d), (3) to obtain approval  
 12 pursuant to § 363(h) for the sale of both the interest  
 13 of the estate and of a co-owner in property, (4) to  
 14 object to or revoke a discharge, (5) to revoke an order  
 15 of confirmation of a chapter 11, chapter 12, or a  
 16 chapter 13 plan, (6) to determine the dischargeability  
 17 of a debt, (7) to obtain an injunction or other  
 18 equitable relief, (8) to subordinate any allowed claim  
 19 or interest, except when subordination is provided in a  
 20 chapter 9, 11, 12, or 13 plan, (9) to obtain a  
 21 declaratory judgment relating to any of the foregoing,  
 22 or (10) to determine a claim or cause of action removed  
 23 pursuant to 28 U.S.C. § 1452.

24 (Emphasis added.)

25 Proulx's efforts to control these estate assets and force a  
 26 payment of same to the Chapter 13 Trustee squarely fits within the  
 27 requirements of Rule 7001, and therefore requires the initiation  
 28 of an adversary proceeding. Without such a proceeding, this Court  
 is not able to grant the requested relief (assuming it is  
 otherwise available).

2. There is no reason that this matter can not be heard  
after normal notice and hearing.

Nowhere in the Application or any of the supporting papers  
 does Proulx set forth any reason that this matter should be heard  
 on an ex parte basis. The reason for this is because no urgency  
 exists. The Application deals with the estate's largest asset,  
 and the disposition of those proceeds will dramatically impact the

1 treatment the other creditors receive under any proposed Chapter  
 2 13 plan. In addition, those proceeds are the subject of a bona  
 3 fide dispute which is currently under appeal. For these reasons,  
 4 this Court should deny the Application and require Proulx to  
 5 comply with the applicable FRBP and BLR by filing and serving a  
 6 fully noticed motion.

7 **3. Proulx lacks standing to bring the Application.**

8 Proulx is a creditor. Through the Application, he is trying  
 9 to force the USA, a third party, to make its final payment(s) to  
 10 the Chapter 13 trustee, another third party. Under these  
 11 circumstances, Proulx lacks standing to seek the requested relief.

12 **C. The Debtor will agree to segregate the funds pending further**  
 13 **disposition by this Court.**

14 The Debtor recognizes that there is currently a Superior  
 15 Court judgment in favor of Proulx, and that, through the  
 16 Application, Proulx is attempting to protect his rights to  
 17 recovery that money. However, the Debtor is also confident that  
 18 she will prevail on her appeal, and that Proulx's claim will  
 19 disappear as a result. The Debtor is concerned that if she loses  
 20 control of those proceeds, somehow they will end up being  
 21 dissipated and she will not be able to recover them when she wins  
 22 the appeal. The clear language of 11 U.S.C. §1306(b), which  
 23 permits the Chapter 13 debtor to retain possession of all estate  
 24 assets, supports Debtor's position.

25 As a compromise, the Debtor is willing to place any such  
 26 payments from the USA into an interest bearing special client  
 27 trust account with her bankruptcy attorneys, Robbins & Keehn.  
 28 Those funds will not be withdrawn or used for any purpose without

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1 this Court's order or the consent of Proulx. In this manner, the  
 2 Debtor's rights under Section 1306(b) are preserved, while  
 3 Proulx's interests in those funds, if any, are also preserved.  
 4 This resolution appears to be fair and equitable to all parties,  
 5 including the Trustee, and is therefore a reasonable middle  
 6 ground.

#### 7 CONCLUSION

8 The relief requested is prohibited under 11 U.S.C. §1306(b)  
 9 as it would take estate property out of the possession of the  
 10 Debtor. The Application is procedurally defective because: (1)  
 11 the requested relief requires the initiation of an adversary  
 12 proceeding under FRBP 7001; (2) this matter should not be heard on  
 13 an ex parte basis, but only after full notice and a hearing; and  
 14 (3) Proulx lacks standing to seek the requested relief. Finally,  
 15 the Debtor has proposed a reasonable compromise which will protect  
 16 Proulx's interests in the proceeds without violating the Debtor's  
 17 rights under Chapter 13 of the Bankruptcy Code. For these  
 18 reasons, the Application should be denied.

19 Dated: Feb. 4, 1999

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21 By:   
 22 Charles F. Robbins  
 23 Attorneys for Debtor  
 24 SARA NEWSOME BURNS

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